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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY TERRONES, Defendant and Appellant.	B143631 (Super. Ct. No. KA048110)

APPEAL from a judgment of the Superior Court of Los Angeles County, Reginald Yates, Judge. Affirmed.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Jeffrey A. Hoskinson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Timothy Terrones was charged in a three-count information with violation of Vehicle Code section 23110, subdivision (b) (throwing an object capable of doing serious bodily harm at an occupied vehicle on a highway) in count 1; violation of Penal Code section 245, subdivision (a)(1) (assault with a deadly weapon by means likely to produce great bodily harm) in count 2; and violation of Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol or drugs) in count 3. Codefendant William Grijalva was charged with violation of Vehicle Code section 23110, subdivision (b) and Penal Code section 245, subdivision (a)(1).[1]

The jury found appellant guilty with regard to counts 1 and 2 only. He was sentenced to eight months in state prison on count 1 and three years in prison on count 2 to run consecutively. On appeal, appellant contends that the trial court erred in failing to stay the sentence on count 1, in permitting the admission into evidence of an out-of-court statement made by Grijalva, in failing to give certain cautionary instructions, and in giving CALJIC No. 17.41.1. Although we agree that a portion of the out-of-court statement of the codefendant should not have been admitted into evidence, we conclude that the error was harmless, and affirm.

EVIDENCE AT TRIAL

Los Angeles County Sheriff's Deputy John Hunter was the only prosecution witness. He testified that on April 2, 2000, he and his partner, Geff Deedrick, were patrolling in a marked vehicle. He observed a black Honda Prelude skid to a stop, almost hitting a white van stopped at a red light in front of it. The passenger in the car, later identified as Grijalva, jumped out, ran to the passenger side of the van, and hit it with his fists. The van turned right and sped away. Grijalva got back

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[1] Grijalva accepted a plea bargain during trial.

into the car, which began to follow the van, back end swaying and tires screeching. The deputies followed the vehicles down Hacidenda Boulevard.

Initially, the van was in the number one lane, and the car in the number two lane. Both vehicles were traveling at speeds of approximately 80 to 85 miles per hour in a 45 mile per hour zone. The car made a sharp movement toward the van, apparently trying to strike it. The van swerved toward the median. The car started to fishtail. A few moments later, the car swerved toward the van again. This time it was positioned slightly in front of the van. The van's tire went up on the center divider. After that incident, the car pulled up next to the van while the passenger, Grijalva, stood up through the sunroof and threw a brick at the van. The brick struck the van just under the passenger side window, and then disintegrated. This entire series of events took place in about a minute.

After the brick was thrown, the deputies activated their lights and siren. The car turned right, going into a skid in the process and came to a stop. The van continued straight and left the scene. Appellant was in the driver's seat of the car. The deputies noticed the smell of alcohol coming from the vehicle. Deputy Deedrick asked appellant if he had been drinking. Appellant said he had had three or four beers. He also said he "had a few" and was "driving stupid." Appellant was asked to exit the vehicle. He walked unsteadily, almost falling down. Field sobriety tests were not performed because appellant was displaying a belligerent attitude.

Over a defense objection, Deputy Hunter was allowed to testify that Grijalva was read his *Miranda* rights back at the station, and agreed to waive them. Grijalva told Deputy Hunter that "people in the white van had thrown a bottle at them earlier and that he was trying to get the person back."

DISCUSSION

I

Appellant contends that he should not have been punished separately for the two counts of which he was found guilty: assault with a deadly weapon based on swerving his car toward the van (count 2) and aiding and abetting Grijalva to throw the brick at the van (count 1). He maintains that the two acts were part of an indivisible criminal transaction with the same intent and that pursuant to Penal Code section 654, the eight-month sentence for count 1 must be stayed.

Penal Code section 654 provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (Pen. Code, § 654, subd. (a).)

"Since *Neal v. State of California* (1960) 55 Cal.2d 11 . . . , the test under section 654 has been: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' (55 Cal.2d at p. 19.) In *People v. Latimer* (1993) 5 Cal.4th 1203 . . . , our Supreme Court reaffirmed the *Neal* approach and noted several cases in which the 'intent and objective' test had been applied to sustain multiple sentences. (See *id*. at p. 1209.) The *Latimer* court also clarified that section 654 applies to sentencing both for crimes flowing from a single act and for crimes resulting from an indivisible course of conduct which violates more than one statute. (5 Cal.4th at p. 1208; accord, *People v. Saffle* (1992) 4 Cal.App.4th 434, 438 . . . .)" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)

"The question of whether the defendant held multiple criminal objectives is one of fact for the trial court, and, if supported by any substantial evidence, its finding will be upheld on appeal." (*People v. Herrera, supra,* 70 Cal.App.4th at p. 1466.)

We do not believe the sentence imposed here violated Penal Code section 654 because appellant and Grijalva performed two separate assaults: swerving the car at the van and throwing a brick at the van. The objective of the first assault was to force the van off the road. The objective of the second assault was to injure the driver and/or any occupants with a thrown brick. Because the acts were separate assaults, involving two different instrumentalities and two different actors, they were sufficiently distinct to support multiple sentences.

We find support for our conclusion in *People v. Nubla* (1999) 74 Cal.App.4th 719, where the defendant committed several acts of violence against his wife -- bloodying her nose by pushing her on the bed, putting a gun to the back of her head, and putting a gun in her mouth. The court held that it was not error to impose multiple sentences for assault with a deadly weapon and corporal injury on a spouse, reasoning that appellant's offense was "somewhat analogous to sex offenses in that several similar but separate assaults occurred over a period of time." (*Id*. at p. 730.) This was significant because, "[i]n connection with sex offenses it has been established that each sexual assault may be viewed as a separately punishable criminal act, notwithstanding that all the offenses arguably were done to obtain sexual gratification. The Supreme Court observed, 'that such a "broad and amorphous" view of the single "intent" or "objective" needed to trigger [section 654] would impermissibly "reward the defendant who has the greater criminal ambition with a lesser punishment." [Citation.] Rather, in keeping with the statute's purpose, the proper view [is] to recognize that a "defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant

who commits only one such act."' (*People v. Harrison* (1989) 48 Cal.3d 321, 335-336 . . . .) The court accordingly found it permissible to conclude that separately punishable acts had occurred when '"[n]one of the sex offenses was committed as a means of committing any other, none facilitate commission of any other, and none was incidental" to any other.' (*Id*. at p. 336.)" (*People v. Nubla, supra,* 74 Cal.App.4th at pp. 730-731.) The court in *Nubla* believed that the same analysis used to support multiple punishment in the sexual assault cases supported the trial court's ruling in the assault case before it. "Appellant's act of pushing his wife onto the bed and placing the gun against her head was not done as a means of pushing the gun into her mouth, did not facilitate that offense and was not incidental to that offense. The trial court was entitled to conclude that each act was separate for purposes of Penal Code section 654." (*People v. Nubla, supra,* at p. 731; see also *People v. Trotter* (1992) 7 Cal.App.4th 363, 366-368 [holding that where defendant fired three shots at a police officer while fleeing in a stolen taxicab, the first shot separated by almost a minute from the second two, he could be punished for two assaults].)

Since Grijalva's act in assaulting the van by throwing a brick at it did not facilitate and was not incidental to appellant's acts in swerving his car at the van, it was not error to impose separate sentences for each count.

II

Appellant next argues that the trial erred in permitting Deputy Hunter to relate to the jury Grijalva's out-of-court statement that "people in the white van had thrown a bottle at them earlier and that he [Grijalva] was trying to get the person back." The defense objected to the introduction of this statement under *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518. The trial court permitted the statement to be introduced after it had been "sanitized" by changing Grijalva's actual statement in which he had said that

"we" were trying to get the person in the van back. The court did not, however, give any limiting instruction directing the jury to consider the statement only as it reflected on Grijalva's guilt.

This court recently considered the limits of the *Bruton/Aranda* rule in *People v. Archer* (2000) 82 Cal.App.4th 1380 and *People v. Hampton* (1999) 73 Cal.App.4th 710. We explained that in *Bruton*, "the Supreme Court held that a defendant's Sixth Amendment right of cross-examination is violated by the admission of a nontestifying codefendant's confession implicating the defendant. Although a jury may be instructed to disregard the confession in determining the nondeclarant defendant's guilt or innocence, the court recognized that 'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. [Citations.] Such a context is presented . . . where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.'" (*People v. Archer, supra*, 82 Cal.App.4th at p. 1386.)

We further noted that the California Supreme Court had reached a similar conclusion in *Aranda*, and that the *Aranda/Bruton* rule had been limited in *Richardson v. Marsh* (1987) 481 U.S. 200, where the court held "that the confrontation clause is not violated by the admission of a codefendant's confession that has been redacted 'to eliminate not only the defendant's name, but any reference to his or her existence,' even if the confession incriminates defendant when considered in conjunction with other evidence." (*People v. Archer, supra*, 82 Cal.App.4th at p. 1386.) *Richardson* required that the testimony be "incriminating on its face . . . ." (*Richardson v. Marsh, supra*, 481 U.S. at p. 208.) In *Bruton*, the nontestifying codefendant confessed to authorities that he and *Bruton* had committed an armed robber together. (*Bruton v. United States, supra*,

391 U.S. at p. 124.) By contrast, in *Richardson*, the codefendant's confession was "sanitized" so that all reference to the defendant was eliminated. The codefendant testified that he and a third party discussed robbing the victim on the way to the scene in a car. He did not give any indication that the defendant was in the car. Later the defendant testified he was in the car, but had not heard the conversation.

In *Hampton*, we followed *Richardson*. The defendant in *Hampton* had arrived at a fast food restaurant ostensibly to pick up his girlfriend. There were two passengers in the car, one male and one female. Just as defendant's girlfriend was leaving, the male passenger went into the restaurant, wearing a ski mask and holding a gun, and robbed the cash register. At trial, his redacted confession was introduced into evidence, including a statement in which he said that he decided to rob the restaurant while sitting in the car and obtained a gun and mask from the trunk. We held that the confession did not expressly implicate the defendant on its face, and was properly introduced with an instruction limiting its use to the codefendant only.

In *Archer*, we reached the opposite conclusion. There, the codefendant's redacted confession informed the jury that the codefendant planned the crime with someone else; that the other person was waiting at a certain address (which the jury knew from other testimony was appellant's) for the codefendant to arrive with the victim; and that the other person stabbed the victim at least eight times in the chest or stomach, moved the body from the patio to the back corner of appellant's yard, covered it with dirt, cut the head off, disposed of it, and moved the body in a car with appellant's license plate number to a place near some rocks. (*People v. Archer*, *supra*, 82 Cal.App.4th at p. 1389.) We concluded that the redacted statement facially incriminated the appellant, noting particularly that "[w]hile appellant's name is not mentioned in the statement, the existence of another participant is obvious from the statement itself" and "appellant's home address and

car license plate number figure prominently in the description of the commission of the crime." (*Id*. at p. 1390.)

Under these authorities, Grijalva's confession that he, personally, was angry with an occupant of the van and threw a brick at the van to get back at that individual was admissible. However, the portion of the statement that indicated that an occupant of the van had thrown a bottle at "them" should not have been introduced. The statement necessarily implicated appellant because, as the driver of the car, appellant was clearly a co-victim of the earlier attack by the van's occupant. The statement was strong evidence of a basis for anger on his part and provided an incriminatory explanation for his erractic driving. Since it was obvious that appellant was the driver of the car at the time the bottle was thrown, there was no way to sanitize that portion of Grijalva's statement to eliminate all reference to appellant as *Richardson* requires.

Moreover, even were we to agree that the statement had been properly sanitized, the confrontation clause requires that a limiting instruction be given, warning the jury not to use the out of court statement made by one codefendant against another. (See *Lilly v. Virginia* (1999) 527 U.S. 116, 128 ["In the years since *Bruton* was decided, we have reviewed a number of cases in which one defendant's confession has been introduced into evidence in a joint trial pursuant to instructions that it could be used against him but not against his codefendant. Despite frequent disagreement over matters such as the adequacy of the trial judge's instructions, or the sufficiency of the redaction of ambiguous references to the declarant's accomplice, we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person."].) The trial court failed to give the required limiting instruction here.

Whether improper introduction of a codefendant's out-of-court statement requires reversal is evaluated under the harmless beyond a reasonable doubt

standard. (*People v. Archer, supra*, 82 Cal.App.4th at p. 1390.) "That analysis generally depends on whether the properly admitted evidence is so overwhelming as to the guilt of the nondeclarant that a reviewing court can say the constitutional error is harmless beyond a reasonable doubt." (*Ibid*.)

In this case, the properly admitted evidence of guilt meets that standard. Deputy Hunter saw appellant's car swerve toward the van twice, causing both vehicles to nearly lose control. Prior to that, he had observed appellant pull his car right behind the van to allow his passenger to get out and strike it. A few moments later, the deputy saw appellant pull alongside the van and keep the vehicle in position while the passenger stood up through the sunroof and threw a dangerous object at the van. Although defense counsel attempted to persuade the jury that this could have been a simple case of erratic driving after having had a few beers, the evidence of appellant racing at high speeds to keep up with the van and the four separate attacks on the van by appellant or Grijalva overwhelmingly points to a deliberate attack on the occupant of the van. We do not believe that excluding the objectionable statement would have led to a different result.

III

Appellant argues that the trial court should have sua sponte instructed the jury to view Grijalva's statement with caution because of his status as a coconspirator. In fact, as we have seen, the court should have instructed the jury not to consider Grijalva's out-of-court statement for any purpose in assessing appellant's guilt. However, for the reasons we have stated, we believe the court's error in this regard was harmless. The properly admitted evidence of guilt was overwhelming, and giving the limiting instruction would not have affected the outcome.

IV

Finally, appellant attempts to persuade us that the trial court erred in giving CALJIC No. 17.41.1. CALJIC No. 17.41.1 (1998 New) provides: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." Appellant contends that giving the instruction denied him due process under the United States Constitution.

The issue of whether CALJIC No. 17.41.1 should be routinely given to jurors prior to deliberations is currently before our Supreme Court. (See *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, S086462.) Just a short time ago, the court decided a closely related issue in *People v. Williams* (2001) 25 Cal.4th 441. In *Williams*, CALJIC No. 17.41.1 had not been given. The foreperson advised the court on his own initiative that a fellow juror believed that the law with regard to rape and statutory rape was wrong and was refusing to discuss those offenses. The court interviewed the juror in question and ascertained that the foreperson's assessment was correct. The court excused the juror and replaced him with an alternate. The jury went on to convict. The Supreme Court affirmed the conviction, stating: "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law. . . . A nullifying jury is essentially a lawless jury. [¶] We reaffirm, therefore, the basic rule that jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law. A juror who is unable or unwilling to do so is 'unable to perform his

[or her] duty' as a juror ([Pen. Code,] § 1089) and may be discharged." (*People v. Williams, supra*, 25 Cal.4th at p. 463.)

Since the Supreme Court has ruled that jurors may be discharged for announcing their intention to ignore the law, we see no harm in giving CALJIC No. 17.41.1. It merely advises the jurors of what could happen if they disregard the law or the court's instructions.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

CURRY, J.

We concur:

VOGEL (C.S.), P.J.

HASTINGS, J.